No. 76-249

In the Supreme Court of the United States

OCTOBER TERM, 1976

STANFORD ROBERT POLL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that his conviction for filing a false tax return is barred by the Double Jeopardy Clause because it was obtained after the reversal of his conviction for failing to account for and pay over employee withholding taxes.

The pertinent facts are as follows: Petitioner was the president of P.B. Industries, Inc. In 1973, he directed the corporate bookkeeper to prepare a false tax return understating the amount withheld from employees' wages during the first quarter of 1973 by approximately $10,000. Petitioner signed the return knowing it was false, and it was filed (Pet. App. A-1).

In March 1974, petitioner was indicted for willfully failing to account for and pay over taxes withheld from employees' wages during the first quarter of 1973, in violation of 26 U.S.C. 7202. A second count charged

a similar offense with respect to the second quarter of 1973. After a trial in the United States District Court for the Western District of Washington, petitioner was found guilty on both counts. However, the court of appeals reversed and remanded the case because the trial court had excluded certain evidence relating to the willfulness of the failure to pay over. *United States* v. *Poll,* 521 F. 2d 329 (C.A. 9) (Pet. App. A-5 to A-14).

On remand, the government elected not to pursue the Section 7202 charge, but instead promptly obtained a new indictment charging petitioner with willful filing of a false tax return, in violation of 26 U.S.C. 7206(1). The new indictment contained only one count, pertaining to the first-quarter corporate return, because the second-quarter return was submitted unsigned. Petitioner was found guilty as charged on the second indictment, and was fined $2,500 and sentenced to four months' imprisonment. The court of appeals affirmed (Pet. App. A-1 to A-4).

1. Petitioner argues (Pet. 8-15) that his conviction for filing a false income tax return is barred by the Double Jeopardy Clause because of the reversal of his conviction for failure to account for and pay over withholding taxes. But as the court of appeals correctly held (Pet. App. A-2 to A-3), this contention is foreclosed by this Court's decision in *United States* v. *Ewell,* 383 U.S. 116, 124-125. There, the defendants were convicted of selling narcotics without written order forms, in violation of 26 U.S.C. 4705(a). The convictions were later set aside on collateral attack (28 U.S.C. 2255) on the authority of an intervening appellate ruling. The government then obtained new indictments charging, *inter alia,* that the same sales had taken place in violation of the original stamped package requirement imposed by 26 U.S.C. 4704(a). On these parallel facts,

this Court held that the Double Jeopardy Clause did not bar retrial under either statute because the original conviction had been vacated on the defendants' motion. The Court stated (383 U.S. at 124-125):

> In these circumstances, where the appellees are subject to a second trial under *Ball* [163 U.S. 662, 671-672] and *Tateo* [377 U.S. 463, 473-474], the fact that §4704, rather than §4705, is charged does not in any manner expand the number of trials that may be brought against them. If the two offenses are not, however, the same, then the Double Jeopardy Clause by its own terms does not prevent the current prosecution under §4704.

Since the government seeks to sustain only one conviction under 26 U.S.C. 7206(1), an offense separate and distinct in law from a violation of 26 U.S.C. 7202,[1] "then the Double Jeopardy Clause by its own terms does not prevent the current prosecution under" Section 7206(1). *United States* v. *Ewell, supra,* 383 U.S. at 125.

Although petitioner recognizes the force of *Ewell,* he argues that it is distinguishable because there the "second prosecution was not initiated until after the final termination of the first prosecution" (Pet. 18). But that is a distinction without a difference. The question is not whether there were two outstanding indictments under which petitioner could have been

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[1]Many federal criminal statutes overlap, and it is, of course, not at all uncommon for a single act or transaction to violate more than one statute. See, *e.g., Pereira* v. *United States,* 347 U.S. 1, 9; *United States* v. *Beacon Brass Co.,* 344 U.S. 43, 45; *United States* v. *Noveck,* 273 U.S. 202, 206-207; *Albrecht* v. *United States,* 273 U.S. 1, 11.

prosecuted, but whether he has twice been put in jeopardy for the same offense. *Ewell* answers that question in the negative.[2]

2. Finally, petitioner urges (Pet. 20-22) that the evidence was insufficient to support his conviction. But petitioner testified that he signed the false return, knowing it was false, for the purpose of deceiving the Internal Revenue Service and preventing it from seizing the corporation's assets for nonpayment of taxes (Tr. 50-61).[3] As the trial court correctly concluded (Tr. 62-64), this evidence establishes the offense of willfully signing a false return under the penalties of perjury. The crime of violating Section 7206(1) is complete when the taxpayer willfully makes and subscribes a return under the penalties of perjury which is false as to a material matter. *United States* v. *Jernigan*, 411 F. 2d 471, 473 (C.A. 5), certiorari denied, 396 U.S. 927; cf. *United States* v. *Tager*, 479 F. 2d 120, 122 (C.A. 10).

In support of his argument, petitioner relies (Pet. 21) upon the court of appeals' statement in its opinion reversing the first conviction that willfulness is "evil

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[2]Petitioner further contends (Pet. 16-20) that the second prosecution violated his rights to due process. But there is no authority for that proposition. While Mr. Justice Fortas expressed such a view in dissent in *Ewell*, he premised his conclusion on the fact that the new indictment greatly exceeded "the original indictment in its charges and threatened penalties" (383 U.S. at 129) and therefore tended to discourage the "exercise of the right to seek review" of a conviction (*id.* at 130). Here, however, the converse situation is presented, for the possible fine and imprisonment which may be imposed under Section 7206(1) are less than those under Section 7202. Moreover, while the first indictment contained two counts, the second indictment contained only one count.

[3]"Tr." refers to the trial transcript.

motive and want of justification in view of all the financial circumstances of the taxpayer" (Pet. App. A-11). Petitioner contends that he presented unrefuted evidence of his lack of financial resources. But the statement of the court of appeals (Pet. App. A-11) was directed only to the element of willfulness in connection with the offense of failure to pay over. Here, however, petitioner seeks review of his conviction for filing a false return. Whatever his financial circumstances may have been, they do not mitigate his willfulness in filing a false return with the admitted intent to deceive the Internal Revenue Service. See *United States* v. *Pomponio*, No. 75-1667, decided October 12, 1976.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

NOVEMBER 1976.

DOJ-1976-11